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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 555

GREYHOUND LINES, INC.,
Appellant,

VERSUS

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and MISSOURI, KANSAS AND OKLAHOMA COACH LINES, a Corporation,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

MOTION TO AFFIRM

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September, 1967

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 5-0030

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Pursuant to Rule 16(1)(c) of the Rules of this Court, Missouri, Kansas and Oklahoma Coach Lines, a corporation, an appellee herein, moves that the judgment of the district court be affirmed.

STATEMENT OF THE CASE

The factual background of this case is outlined in some detail in the decision of the Interstate Commerce Commission (the Commission) which is reproduced as Appendix B to appellant's Jurisdictional Statement (J.S. at 26-31, here-

inafter cited as J.S. App.). In essence, Greyhound Lines, Inc. (Greyhound), the appellant, is seeking to cancel its tariff filings with the Commission which provide for interchangeability of tickets between Greyhound and appellee Missouri, Kansas and Oklahoma Coach Lines (MK&O).

The practice in dispute here, optional honoring of tickets, is an arrangement by which one carrier can accept a ticket for transportation issued by, or designating, another carrier for a point or points served by both carriers. The "option" is the passenger's, which means that the passenger chooses which carrier and which schedule he chooses to ride at any particular time, without regard to which of the two carriers serving this route is shown on the ticket as being the carrier for this portion of the route.

If one of the carriers honors a ticket issued by the other, at the end of the month the ticket so honored is included in a claim, called a reclaim, which is submitted by the carrier which furnished the transportation to the carrier which sold the ticket; the carrier which sold the ticket deducts 10% as its sales commission and pays the rest of the price which the passenger paid for the ticket to the transporting carrier. If the ticket was sold by a connecting carrier, then the reclaim is made by the transporting carrier against the carrier which originally sold the transportation, which then remits the appropriate amount for that portion of the route over which the claiming carrier transported the passenger, less the sales commission of 10%. (Statement of MK&O Witness Hicks filed with ICC 9/30/65, ¶¶ 10-11 at 5-6, hereinafter cited as Hicks.)

Optional honoring is not unique to the bus industry; the scheduled air carriers have universally adopted this practice (MK&O ICC Ex. 6, such exhibits being hereinafter cited as MK&O Ex.).

From 1935 until the present time, MK&O, a small, family-owned independent bus company, has operated over the route between St. Louis, Missouri and Oklahoma City, Oklahoma, serving the cities of Joplin and Springfield, Missouri and Tulsa, Oklahoma en route. MK&O also serves an extensive area in north central Oklahoma where it furnishes the only public transportation service (Hicks ¶ 4 at 2-3 and MK&O Ex. 1). Greyhound serves substantially the same St. Louis-Oklahoma City route.

Beginning in 1939, MK&O and Greyhound instituted the practice of optional honoring of tickets and operated out of the same terminals and stations. However, after MK&O rebuffed a Greyhound attempt to purchase an interest in MK&O in 1962, the relationship between the two carriers began to deteriorate (J.S. App. at 28-29). In 1963 and 1964 Greyhound instituted new schedules which intercepted substantially all of MK&O's former connections with incoming carriers at Tulsa and Oklahoma City, cancelled its joint St. Louis-Texas through-bus operations with MK&O and ceased showing MK&O's schedules in Greyhound's published schedules (Hicks ¶¶ 32-33 at 16-17; Statement of MK&O Witness Allen filed with ICC 9/30/65, ¶¶ 33-34 at 32-33, hereinafter cited as Allen). As a result of these Greyhound actions, MK&O's revenues declined almost 20%, from $1,078,482 in 1962 to $878,115 in 1964 (Allen ¶ 34 at 33).

After administrative relief against Greyhound's schedule changes was finally denied in May, 1965, in June, 1965, MK&O instituted its own new schedules in an attempt to compete more effectively with Greyhound for the connections with other carriers of which MK&O had been deprived by Greyhound's 1963 and 1964 schedule changes. Greyhound immediately made tariff filings with the Interstate Commerce Commission, the Corporation Commission of Oklahoma and the Missouri Public Service Commission, seeking to terminate the 26-year optional honoring of tickets arrangement with MK&O (Allen ¶ 39 at 35; Hicks ¶¶ 6-8 at 4-5). This would have had the effect of preventing MK&O from accepting Greyhound or Greyhound-routed tickets without Greyhound's prior permission, thereby shifting the "option" from the passenger to Greyhound. The Commission first suspended and then disapproved Greyhound's proposed filing, and that is the decision involved here.[1]

Greyhound and Greyhound-routed tickets carried by MK&O under the optional honoring arrangement represented 26% of MK&O's gross passenger revenues in

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[1] The Oklahoma Corporation Commission also required the continuation of optional honoring in Oklahoma intrastate commerce and its action was affirmed by the Oklahoma Supreme Court in *Greyhound Lines, Inc.* v. *Corporation Comm'n*, 430 P.2d 1 (Okla. 1967).

The Missouri Public Service Commission first held that Greyhound might terminate optional honoring only from those points where ticket agents were always available but then reconsidered and suspended the effectiveness of its decision to await the final outcome of the judicial review of the Interstate Commerce Commission decision involved here, apparently intending to adopt that result as its own. Optional honoring is therefore still effective in Missouri intrastate commerce (Mo. Pub. Serv. Comm'n Case No. B-24,122; see Order Extending Effective Date entered February 15, 1967).

1964; without those revenues MK&O would have operated at a substantial loss (Allen ¶ 35 at 33-34). MK&O's local service in areas where it is the only common carrier is subsidized by its St. Louis-Oklahoma City operations; the termination of optional honoring would severely impair MK&O's ability to maintain its service in those areas (Allen ¶ 36 at 34).

Under an antitrust consent decree entered in 1957,[2] Greyhound is forbidden to oust other carriers from Greyhound terminals, and MK&O presently operates from terminals also served by Greyhound.[3] This is because as a result of Greyhound's domination of the bus industry, by far the largest portion of the available traffic is brought into, attracted or directed to Greyhound terminals (Allen ¶ 21 at 26). However, over the years MK&O has experienced a continuing failure on the part of Greyhound personnel, and even Greyhound-influenced independent commission agents, to quote MK&O schedules and service which is competitive with that of Greyhound (Allen ¶ 23 at 27-28). If the passengers holding Greyhound or Greyhound-routed tickets were, in addition, to be deprived of the right, which they have under optional honoring, to use MK&O's service without prior Greyhound approval, the practical effect of this combination of circumstances would be to destroy MK&O as an effective competitor of Greyhound (Allen ¶ 23 at 27).

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[2] *United States* v. *The Greyhound Corporation*, Civil Action No. 57-C-1107 (N.D. Ill., June 27, 1957) (MK&O Ex. 20).

[3] In August, 1964, MK&O was forced to terminate its service to the St. Louis Trailways Terminal, which it had served for over 30 years, as a condition to being permitted to use the new Greyhound St. Louis terminal (Allen ¶ 13 at 23).

The foregoing Statement has been limited to a summary of the evidence presented to the Commission demonstrating the detriment to MK&O which would flow from the termination of the practice of optional honoring. This is because the value to the ticket purchaser of the right to freely choose the carrier on which he will ride is sufficiently described in the Commission's decision (J.S. App. at 32, 33).

THE QUESTION PRESENTED IS NOT SUBSTANTIAL

Neither in the court below nor here does Greyhound dispute the factual basis for the Commission's decision. Its attack rests solely upon the legal proposition that the Commission has no authority to require the institution of an optional ticket honoring arrangement by a carrier; *ergo*, the Commission may not prevent the cancellation of a tariff provision embodying such a practice once established, regardless of its antiquity, its value to the public, the adverse effect of its cancellation upon other carriers and the public and the fact that the cancelling carrier has presented no factual justification whatsoever for its proposed termination.

Section 217(a) of the Motor Carrier portion (Part II) of the Interstate Commerce Act, 49 U.S.C. § 317(a), requires the filing of tariff provisions by motor common carriers. Section 217(c), 49 U.S.C. § 317(c), requires 30 days' notice of any proposed change in a "rule, regulation, or practice affecting . . . [a] rate, fare, charge, . . . or the value of the service thereunder." Greyhound apparently concedes (J.S. at 7) that these sections require the filing

with the Commission of tariff provisions embodying optional honoring arrangements and proposals to terminate such arrangements. It could hardly do otherwise at this point, since it faithfully maintained tariffs describing optional honoring in effect over the years, and carefully followed the statutory tariff change procedure when it sought to cancel the arrangement.

However, Greyhound denies the applicability to optional ticket honoring arrangements of Section 216(g), 49 U.S.C. § 316(g), which empowers the Commission to suspend and ultimately disallow proposed tariff changes which are not "just and reasonable," despite the fact that the pertinent language employed in Section 216(g) ("rule, regulation, or practice affecting . . . [a] rate, fare, or charge, or the value of the service thereunder") is identical with that in Section 217(c), the applicability of which is conceded by Greyhound. Greyhound also of necessity denies that Sections 216(a) and (e), 49 U.S.C. §§ 316(a), (e), could be interpreted to permit the Commission to require motor carriers of passengers to establish such arrangements as ticket optional honoring, although once again substantially the same, if not even broader, statutory language is there to be found.

Greyhound derives the gloss which assertedly causes language requiring the filing of optional ticket honoring tariff provisions under Sections 217(a) and (c) to be insufficient to give the Commission jurisdiction of such arrangements under Sections 216(a), (e) and (g), from authorities involving one specific form of joint traffic arrangement, the so-called "through route." To bolster this, Greyhound also invokes what it fondly hopes is a still vital

"brooding omnipresence" of the pre-Motor Carrier Act common law. It should be emphasized that no authority cited, be it statute or precedent, denies to the Commission jurisdiction over ticket honoring arrangements.

The Motor Carrier Act Commission decisions cited by appellant (J.S. at 7-8) relate only to the Commission's disclaimer of authority to require the maintenance of through routes between motor carriers of *property*, or motor carriers of property and water carriers. The provisions of Section 216(c), 49 U.S.C. ¶ 316(c), expressly state that the establishment of such through routes is optional on the part of the carriers. It is certainly a defensible interpretation on the Commission's part (no court has ruled on the question) that where the Congress has specifically stated its intention that the establishment of through routes between motor carriers of property and between such carriers and other types of carriers should be voluntary, the Commission should not prevent the termination of such through routes by a carrier which elects to do so. However, the statutory language carves out no such exception for ticket honoring arrangements.

The decisions applying the "short-haul" proviso of Part I of the Interstate Commerce Act, Section 15(4), 49 U.S.C. § 15(4), which limits the Commission's power to require the establishment of through routes and joint rates under Section 15(3), 49 U.S.C. § 15(3), discussed by appellant (J.S. at 10-11 & n. 1) are subject to the same infirmity as precedents. There Congress made unmistakably clear its intention that no carrier should be forced to "short-haul" itself by the Commission; hence, the Commission could not (until the amendment of Section 15(3)

by the Transportation Act of 1940, 54 Stat. 911 (1940)) in effect subvert the Congressional intent by forbidding the cancellation of "short-hauling" through routes voluntarily established by the carriers. There is no comparable expression of Congressional intent applicable to ticket honoring arrangements.

Apparently recognizing this flaw in the fabric of its argument, appellant then maintains that common law principles in some manner permeate the Motor Carrier Act of 1935 (49 U.S.C. §§ 301-27), and as a corollary to this contention, that the Motor Carrier Act confers no jurisdiction on the Commission over ticket honoring arrangements, because one carrier could not compel another to enter into such an arrangement under the common law (J.S. at 15-18). However, as this Court recognized with respect to the Motor Carrier Act of 1935 in *American Trucking Ass'n* v. *United States*, 344 U.S. 298, 309-10 (1953), and Part I of the Interstate Commerce Act, as amended, in *United States* v. *Pennsylvania R.R. Co.*, 323 U.S. 612, 616 (1945), the complexities of regulating common carriers of interstate traffic necessitate a broad statute which leaves substantial discretion to the Commission to interpret its provisions in the light of Congressional purposes and the public interest. To treat the comprehensive language of Sections 216(e) and (g) of the Motor Carrier Act of 1935, which was obviously intended to grant to the Commission a broad regulatory charter, as by implication limited in its scope by the pre-existing common law would constitute a perversion of the intent of the Congress.

In 1907, a purported restriction on the free transferability of railroad tickets was held to affect "the value of

the ticket" and was invalid since it was not contained in the applicable tariff. *B&O R.R. Co.* v. *Hamburger*, 155 F. 849, 851-52 (C.C.E.D. Va. 1907). This is closely analogous to the case at bar, because the practical effect of optional honoring is that the passenger transfers what would be his right to a refund of his unused ticket on one carrier to the carrier which in fact transports him, in payment for his transportation by the latter.

A tariff provision granting ticket purchasers the right to require the honoring of their tickets by two or more carriers is obviously a "rule, regulation or practice affecting . . . [a] rate, fare, or charge, or the value of the service thereunder" as described in Sections 216(e), (g), and 217(c). The Commission so found, and further found that Greyhound had not sustained its burden of demonstrating that the cancellation of this practice was "just and reasonable" (§ 216(g)) (J.S. App. at 32, 33-34). Greyhound does not challenge the factual basis of these findings.

There is no statutory limitation on the Commission's authority with respect to ticket honoring arrangements, such as is to be found in the case of through routes. Therefore, none of appellant's authorities are in point. Greyhound's understandable desire to impair MK&O's effectiveness as a competitor cannot serve to justify a tariff change which the Commission has found will harm both the public and MK&O (J.S. App. at 33-34). *Cf. United States* v. *American Railway Express Co.*, 265 U.S. 425, 436-38 (1924).

CONCLUSION

For the reasons stated above, the question presented by appellant is not substantial and the judgment of the district court should be affirmed.

Respectfully submitted,

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